Heartshare Human Services of New York, Inc. *and* CSEA, Local 1000, American Federation of State, County and Municipal Employees, AFL–CIO. Cases 29–CA–24269, 29–CA–24318, and 29–CA–24564

July 29, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On June 7, 2002, Administrative Law Judge Raymond P. Green issued the attached decision.[1]

We adopt the judge's finding,[2] for the reasons stated in his decision, that the Respondent's executive vice president, Kathleen Meskell, unlawfully threatened an employee with job loss if the employees selected a union to represent them. For the reasons set forth below, we also adopt the judge's findings that the Respondent's former program director, Carol Roberti, did not unlawfully interrogate employees Consuela Hodge and Larry Evans about their union activities, and did not unlawfully create the impression that the employees' union activities were under surveillance.[3]

I. FACTUAL BACKGROUND

The Respondent is a day treatment program that serves adults with severe developmental disabilities, whom the Respondent refers to as "consumers." The Respondent employs approximately 60 employees at its Woodside, New York facility, known as the Hoffman Day Treatment Center (Hoffman). There are several senior instructors and assistant instructors at Hoffman to provide direct care to the consumers, including dressing, undressing, positioning, feeding, cleaning, and bathrooming.

In March 2001, a woman who only identified herself as "Shirley"[4] approached employee Consuela Hodge after work hours at a bus stop near the Hoffman facility. Shirley did not mention that she was from a union. After learning that Hodge worked at Hoffman, Shirley began asking her questions regarding the Respondent's wages and working conditions. Rather than answering Shirley's questions, Hodge referred Shirley to her supervisor.

The following day, Hodge told her senior instructor, Susan Manwaring, about her encounter with Shirley. Just as Hodge was relaying the story, Assistant Program Director Robin Adams joined the conversation and was also told about the bus stop incident.[5] The three individuals speculated whether Shirley might be from a union.

Later that same day, Shirley approached Hodge again at the bus stop after work and asked her questions similar to those Shirley asked the previous day. A day after this second encounter, Hodge was asked to meet with Hoffman Facility Program Director Carol Roberti[6] in her office. According to Hodge, Roberti first stated, "she heard that somebody was asking [Hodge] questions at the bus stop." Roberti then asked Hodge whether this person was a man or a woman. Hodge replied that the person was a woman. Roberti asked for a physical description of the woman, and some other general questions, such as what the woman was wearing and whether she drove. Hodge truthfully answered all of Roberti's questions.[7] The testimony reflects that Roberti did not ask Hodge anything further—in fact, the word "union" was never even mentioned; nor did Roberti inquire about the substance of Hodge's discussion with Shirley.

Around this same time period, Shirley also approached Hoffman employee Larry Evans at a bus stop after work hours. She asked Evans the same sort of questions she asked Hodge. The day after his conversation with Shirley, Roberti requested that Evans meet with her in her office. Roberti began the meeting by mentioning that she had heard that a union representative had approached Consuela Hodge and "someone else" at the bus stop. Without specifying whom that "someone else" was, she asked Evans what the union representative looked like. Evans gave her a "basic description" of the individual.[8] Roberti also asked Evans whether he had ever been in a union. When Evans

[1] The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent and the General Counsel filed answering briefs. The Respondent filed a letter in reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order, except that the attached notice is substituted for that of the administrative law judge.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] No exceptions were filed to the judge's dismissal of the 8(a)(1) allegations of unlawful interrogation and solicitation of grievances in June and August 2001.

[4] "Shirley" did not testify at the hearing.

[5] The judge stated that Hodge told Adams about Shirley. The record evidence, however, shows that Manwaring, in Hodge's presence, was the one to tell Adams about Hodge's encounter with Shirley.

[6] Roberti is no longer employed by the Respondent and did not testify at the hearing.

[7] Hodge told Roberti that the woman had braids and was African-American, but that she did not know whether the woman drove.

[8] Evans told Roberti that the union representative was African-American with braids in her hair.

replied that he had, Roberti stated that she had also been in one. According to Evans' testimony, that was the extent of their conversation.

II. ANALYSIS

A. Interrogation

Contrary to our dissenting colleague, we agree with the judge that Roberti did not coercively interrogate employees Hodge and Evans regarding their union activities. In determining whether a supervisor's questions to an employee constitute an unlawful interrogation, the Board examines whether, under all the circumstances, the questioning reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub. nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Under this totality of circumstances approach, the Board examines factors such as the employer's background (i.e., whether there is a history of employer hostility and discrimination); the nature of the information sought (e.g., whether the interrogator appeared to be seeking information on which to base action against individual employees); the identity of the questioner (i.e., his position in the company hierarchy); place and method of interrogation (e.g., whether the employee was called from work to the boss' office; whether the tone of the questioning was hostile or threatening); and truthfulness of the reply. *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Although "strict evaluation of each factor" is not required, these "useful indicia . . . serve as a starting point for assessing the totality of the circumstance[s]." *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998).

Applying the above factors to the facts of this case, we find that Roberti's questioning of Hodge and Evans did not reasonably tend to interfere with, coerce, or restrain the exercise of their Section 7 rights.

Notwithstanding that Roberti was a high-level supervisor, and the conversations occurred in her office, we find that the relevant factors, considered in their entirety, are insufficient to establish an unlawful interrogation. First, the questions all came about because Hodge had voluntarily reported to management about her encounter with Shirley. The Respondent was trying to find out about Shirley. The questions did not concern the employees' union sympathies or activities, but instead were limited to entirely neutral matters, such as Shirley's physical description.[9] We disagree with our dissenting colleague that Roberti's limited efforts to obtain a physical description of an unknown individual who was repeatedly approaching the Respondent's employees as they left its worksite was conduct that would reasonably tend to coerce employees in the exercise of their Section 7 rights. Nor do we find merit in our colleague's characterization of Roberti's questions about Shirley's appearance as a "painstaking examination" or in his conclusion that, by "taking such pains" to obtain a physical description of Shirley, Roberti's comments were coercive. In any event, because the subject matter of Roberti's questions—Shirley's physical appearance—was not coercive, her questions cannot become coercive merely because Roberti sought an accurate rather than a generalized physical description.

Similarly as to Hodge, nothing in Roberti's comments linked Shirley to the Union. Further, in neither of her brief comments to Hodge or Evans did Roberti inquire into the substance of the employee's conversations with Shirley.

As to the method of interrogation, neither Hodge nor Evans testified that Roberti's tone was hostile or threatening, and she did not make any explicit or implicit threats of reprisal or promises of benefit in the context of her questioning. In fact, after she asked Evans whether he had been in a union, Roberti told him that she had been in one in the past too.[10] Additionally, the fact that both employees truthfully answered Roberti's questions is evidence that there was nothing in those questions that could reasonably have "inspired fear" in the employees. *Bourne*, supra at 48. Again, Roberti's questions appear to be no more than a casual and amicable inquiry as to who was approaching Hoffman employees after work, and the questioning was never followed up. Finally, there is no evidence that the Respondent has a history of union animus.[11]

In our view, this type of exchange does not amount to coercive interrogation. As the judge pointed out, "the mere fact that Roberti sought to satisfy her curiosity as to who was approaching employees on their way home, was normal behavior and was rather innocuous and noncoercive."

We reject our dissenting colleague's claim that Roberti's questioning constitutes an unlawful interrogation because, among other things, the nature of the questioning itself was coercive. Contrary to our colleague, we do not find that the employees reasonably would have believed that Roberti sought information on which to base discipli-

[9] Thus, *Phillips Industries*, 172 NLRB 2119, 2123 (1968), enfd. sub nom. *Clarke v. NLRB*, 410 F.2d 756 (4th Cir. 1969), relied on by the dissent, is inapplicable. There, management specifically questioned the employees about their union activities [passing out union authorization cards].

[10] Roberti's comment to Evans that she had once been in a union would reasonably be perceived as a friendly observation that she and Evans shared similar backgrounds.

[11] We acknowledge that neither employee had disclosed his/her union sympathies prior to the questioning. Despite this fact, however, we believe that the surrounding circumstances of the questioning do not lend themselves to finding an 8(a)(1) violation. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

nary action against those who engaged in union activities. The questions were harmless inquiries, limited to Shirley's *physical appearance*. To find that the Respondent sought this limited information in order to take future disciplinary action against its employees is wholly speculative.

Nor do we agree with the dissent that employees would reasonably be inhibited from engaging in Section 7 activity because of Roberti's very narrow area of inquiry, which inquiry sought absolutely no information about the employees' discussions with Shirley or about the employees' activities.

The dissent makes a number of leaps to support this view. It says that an employee would "assume" from the questions that the Respondent wanted to be able to spot Shirley if Shirley came near the facility again. And, the dissent then infers from that assumption that the employee would refrain from associating with Shirley. In our view, both the assumption and the inference are unwarranted.

In sum, considering the factors above, we agree with the judge that the Respondent did not coercively interrogate its employees in violation of Section 8(a)(1) of the Act. We therefore affirm the judge's dismissal of this allegation.

B. Impression of Surveillance

We also adopt the judge's finding that the Respondent did not create an impression that the employees' union activities were under surveillance. In order to establish an impression of surveillance violation, the General Counsel bears the burden of proving that the employees would reasonably assume from the statement in question that their union activities had been placed under surveillance. *Grouse Mountain Lodge*, 333 NLRB 1322 (2001), enfd. 56 Fed. Appx. 811 (9th Cir. 2003). Contrary to our dissenting colleague, we adopt the judge's findings that employees Hodge and Evans could not have reasonably believed that their union activities were under surveillance.

Hodge initiated the conversation with Senior Instructor Manwaring in which Hodge told Manwaring about the encounter with Shirley at the bus stop. When Assistant Director Adams joined their conversation in midcourse, Manwaring told Adams about the "Shirley encounter" in Hodge's presence. Adams testified, without contradiction, that she later told Director Roberti about Hodge's encounter with Shirley. Thus, when Roberti thereafter stated to Hodge that she had heard that somebody had been asking Hodge questions at the bus stop, Hodge would have reasonably assumed, as the judge found, and the facts support, that Adams had told Roberti about the conversation between Manwaring, Adams, and Hodge. Under these circumstances, there is nothing that would have suggested to Hodge that management was surreptitiously surveiling Hodge's union activities.

We also agree with the judge that the Respondent did not create an impression of surveillance with respect to Larry Evans. At the beginning of her conversation with Evans, Roberti mentioned that she heard that "Consuela [Hodge] and someone else" had been approached by the Union. We find that this statement alone would not have caused Evans to reasonably believe that the Respondent was surreptitiously surveiling the employees' union activities. Presumably, a spy would know who the "someone else" was. Thus, the employee would reasonably believe that the information was not the product of surveillance.

We agree with the judge in the circumstances of this case that "nothing in Roberti's statements . . . could reasonably lead either employee to conclude that their own union activities, or the activities of other employees, were being spied upon or being kept under surveillance." For these reasons, we affirm the judge's dismissal of this allegation.[12]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Heartshare Human Services of New York Inc., Woodside, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.[13]

MEMBER WALSH, concurring in part and dissenting in part.

I join my colleagues in finding that the Respondent unlawfully threatened employee Larry Evans with job loss in July 2001. Contrary to the judge and the majority, however, I would find that the Respondent violated Section 8(a)(1) of the Act by interrogating employees Consuela Hodge and Larry Evans about their union activities and by creating, in the mind of Larry Evans, the impression that the employees' union activities were under surveillance.

The relevant facts are as follows. Shirley, a union representative, approached Hodge at a bus stop around the corner from the Respondent's facility. Shirley asked Hodge if she worked at the Hoffman facility. When Hodge replied that she worked there, Shirley asked her questions about the wages and working conditions at the facility. Hodge did not answer, but instead referred Shirley to her supervisor at Hoffman.

The next morning Hodge told her senior instructor, Susan Manwaring, about her conversation with the woman

[12] In affirming the judge's dismissal of this allegation, we do not rely on the judge's finding that the Respondent could not have created the impression of surveillance of employees' union activities because there were no union activities to be surveilled.

[13] We shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

at the bus stop. Manwaring told Hodge that it was possible a union was attempting to organize workers at Heartshare. Manwaring also told Hodge that unions have, on previous occasions, tried to organize Hoffman workers, but were unable to do so. While Hodge was talking to Manwaring, Assistant Program Director Robin Adams joined the conversation. Manwaring told Adams about Hodge's conversation with Shirley. Adams stated that Shirley "was probably from a union." Later that same day, Shirley again approached Hodge at the bus stop and asked her questions similar to those asked the day before.

The following day, Program Director Carol Roberti asked Hodge to come into her office to speak with her. According to Hodge's testimony, Roberti mentioned that she heard that somebody was asking Hodge questions at the bus stop. When Hodge replied that this was correct, Roberti started asking Hodge a series of questions concerning the identity of this person, including her nationality, hairdo, and clothing, and whether Hodge knew if she drove. After answering the questions, Hodge was permitted to return to her normal duties.

Hodge testified that she had never before been called into Roberti's office for a discussion. She indicated that employees were not often called into Roberti's office, unless there was something going on with one of the consumers, or there was an ongoing investigation of a business matter.

Around this same time, Union Representative Shirley also approached employee Evans at a bus stop outside the Respondent's building. Evans testified that Shirley asked him whether he worked at Hoffman and then asked him about the working conditions there. The day after Evans spoke with Shirley, Roberti summoned Evans over the facility's loudspeaker to appear in her office. According to Evans' testimony, Roberti began the questioning by first "mention[ing] that Consuela [Hodge] and someone else had been approached by someone from the union." Then, without mentioning that she knew that Evans was the "someone else" who had talked with Shirley, and how she knew that, Roberti asked Evans to describe the physical characteristics of the union representative with whom he had spoken at the bus stop. Evans described Shirley to Roberti. Roberti then asked Evans whether he had ever been in a union. Evans told her that he had been in a union in the past. The questioning ended shortly thereafter.

A. Interrogation

As my colleagues acknowledge, in determining whether an interrogation is unlawful, the Board examines whether, under all the circumstances, the questioning reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Under the totality of circumstances approach, the Board examines factors such as whether the interrogated employee is an open and active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Demco New York Corp.*, 337 NLRB 850 (2002). Applying these factors, I find, contrary to my colleagues, that the circumstances here show that Roberti's questioning had a tendency to interfere with the employees' exercise of their protected rights.

Here, both the location of the interrogation and the identity of the questioner tended to create a coercive environment because the questioning occurred in the office of the highest ranking official at the facility, and the questioning was conducted by that official. *Ferguson-Williams, Inc.*, 322 NLRB 695, 698 (1996). Hodge testified that employees were rarely called into Roberti's office, and were only called in to discuss client issues, investigative matters, or personal problems. See *Phillips Industries, Inc.*, 172 NLRB 2119, 2123 (1968), enfd. sub nom. *Clarke v. NLRB*, 410 F.2d 756 (4th Cir. 1969) (whenever a high executive calls production line workers into his office and questions them about union activities, there is inevitably an implication of coercion). In addition, Evans was summoned over the loudspeaker to Roberti's office. The use of a loud speaker to summon employees has an inherently coercive effect upon employees because of the fear and embarrassment associated with it. See *Phillips Industries*, supra at 2123.

Furthermore, Roberti's questions alone had elements of coercion sufficient to find a violation. Roberti asked pointed questions to Hodge and Evans about Shirley's physical appearance. She wanted to know what type of clothing Shirley was wearing as well as her nationality and hairstyle, and Roberti also wanted to know whether Shirley drove. These detailed questions were not "harmless inquiries" as the majority suggests. Instead, this type of interrogation would reasonably raise a question in the employees' mind as to why the Respondent wanted such detail regarding a union representative's identity. The employees would have reasonably assumed that the Respondent's painstaking examination as to Shirley's physical characteristics was for the purpose of ensuring that it would be able to spot her should she ever come near the Respondent's facility again.[1] An employee would reasonably be inhibited from associating with a person that

[1] Contrary to my colleagues' contention, my position is based on reasonable inferences drawn from the facts of this case, not speculative "leaps." It is well established that the "NLRB is empowered to draw permissible inferences from credible testimony." *NLRB v. L & B Cooling, Inc.*, 757 F.2d 236, 241 (10th Cir. 1985).

the Respondent was taking such pains to spot, out of fear of reprisal for associating with such a person.[2] See *John W. Hancock, Jr., Inc*., 337 NLRB 1223, 1224 (2002) (In evaluating the nature of the information sought, the relevant consideration is whether the questioner appeared to be seeking information upon which to take action against individual employees). Consequently, Roberti's questioning had the tendency to chill the employees' exercise of their protected rights.[3]

In addition, I find that Roberti's questioning had a tendency to be coercive in light of the fact that the employees had not disclosed their union sympathies. See *Demco New York Corp*., supra (the fact that the employee was not an open union supporter and had not revealed his union sentiments prior to the interrogation supported the finding that the interrogation was coercive).[4]

Under the totality of circumstances, I find, contrary to my colleagues, that the factors here establish that the Respondent's questioning was coercive. Accordingly, I would find that Roberti's questioning violated Section 8(a)(1) of the Act.

B. Impression of Surveillance

Contrary to my colleagues, I would also find that the Respondent's statement to Evans unlawfully created the impression that it was engaging in surveillance of the employees' union activities.[5] As the majority notes, the Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that his union activities had been placed under surveillance. *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999). "The idea behind finding 'an impression of surveillance' as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Flexsteel Industries*, 311 NLRB 257 (1993). "When an employer creates the impression among its employees that it is watching or spying on their union activities, employees' future union activities, their future exercise of Section 7 rights, tend to be inhibited." *Robert F. Kennedy Medical Center*, 332 NLRB 1536, 1539 (2000).

Applying the above principles to the facts of this case, I find that Roberti's statements to Evans would suggest that the Respondent was closely monitoring the degree and extent of employees' union activities. Specifically, Roberti's statements imply that she knew that Evans was the "someone else" who had talked to Union Representative Shirley, even though the evidence does not show that Evans spoke with anyone at the Respondent's facility about his conversation with Shirley until *after* his meeting with Roberti. I believe that Roberti's statement would reasonably raise an issue in Evans' mind as to *how* the Respondent learned of his encounter with Shirley, and that Evans would reasonably have believed that the Respondent had gained its knowledge of his meeting with Shirley through unlawful surveillance, rather than by lawful means. This impression of surveillance would have the reasonable tendency to inhibit Evans in the future exercise of his Section 7 rights. See *Ballou Brick Co.*, 277 NLRB 41, 57 (1985), enfd. in relevant part 798 F.2d 339 (8th Cir. 1986) ("The Board has long held that when management gives its employees the impression that it is spying on their union meetings and activities, it has a chilling effect, and a tendency to deter employees from their rightful participation in union activities.").[6]

[2] Because Roberti did not specifically inquire about the substance of the employees' discussion with Shirley, my colleagues assert that the employees would not have reasonably felt inhibited from engaging in future Sec. 7 activity. Employer questioning, however, need not rise to the level of a blatant probing into an employee's union sympathies before an interrogation violation may be found. As the Fifth Circuit has recognized, "Coercion by interrogation is one of the 'subtler' forms of management's interference with labor's protected rights." *NLRB v. Camco, Inc*., 340 F.2d 803, 804 (5th Cir. 1965) (quoting Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 106 (1964)). Here, as discussed above, Roberti's detailed and repeated questioning about union organizer Shirley's physical appearance, for which Roberti offered no legitimate explanation, would reasonably tend to discourage Hodge and Evans from being seen talking to Shirley.

[3] My colleagues focus exclusively on whether the Employer was gathering information for the purpose of retaliating against the employees for union activities, and assert that, by concluding that it was doing so, I am engaging in speculation. As stated above, however, it is the reasonable tendency of the questioning to interfere with employee rights that is the touchstone, not the Employer's motive. It is clear to me that Roberti's questioning would have had a tendency to chill any desire these employees might have had to associate with this union organizer.

[4] My colleagues rely on the fact that Hodge and Evans truthfully answered the questions asked, and therefore did not feel coerced by Roberti's questions. The fact that the employees honestly answered Roberti's questions also "could reflect nothing more than" their "surprise at the question[s]." *BJ's Wholesale Club*, 319 NLRB 483, 484 (1995).

[5] In light of this finding, I find it unnecessary to pass on whether the Respondent created an impression of surveillance with respect to Consuela Hodge, because to do so would be cumulative and would not affect the order.

[6] I disagree with the judge's findings that the Respondent could not have created the impression of surveillance of employees' union activities because there were no union activities to be surveilled. Contrary to the judge, I find that, in the instant case, the employees were engaged in union activity by speaking to Union Representative Shirley, even if they did not initiate that contact or have any interest in it. See *Westchester Iron Works Corp*., 333 NLRB 859, 865, 867 (2001) (employees

Accordingly, contrary to my colleagues, I would reverse the judge's finding that the Respondent did not violate Section 8(a)(1) by creating the impression that the employees' union activities were under surveillance.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell employees that their selection of a union to represent them could lead to the loss of jobs.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

HEARTSHARE HUMAN SERVICES OF NEW YORK, INC.

Sharon Chau, Esq., for the General Counsel.
Peter M. Pankin and *Steven M. Latino, Esqs.*, for the Respondent.
William A. Herbert Esq., for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried before me in New York City on March 22, 2001. The charge in Case 29–CA–2269 was filed on May 30, 2001. The charge in Case 29–CA–24318 was filed on June 27, 2001. The charge and amended charge in Case 29–CA–24564 was filed on October 29 and December 27, 2001.[1] A consolidated complaint was issued on August 10, 2001, and a further consolidated complaint was issued on January 3, 2002. In substance the second consolidated complaint alleges:

1. That in March and April 2001, the Respondent by Program Director Carol Roberti, interrogated employees about their union membership and support.

2. That in March and April 2001, the Respondent, by Roberti, created the impression of surveillance.

3. That in early June and late August 2001, Roberti interrogated employees regarding their knowledge of unfair labor practice charges filed by the Union.

4. That in early June and late August 2001, Roberti solicited employee complaints and grievances and impliedly promised to remedy them if employees abandoned their union support.

5. That in or about July 2001, the Respondent, by Executive Vice President Katie Meskell, threatened employees with job loss if they supported the Union.

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is admitted and I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent is a charitable enterprise engaged in providing services for severely handicapped people. It has a number of facilities in New York and employs over a thousand employees. The facility involved in the present case is located at 62–10 Northern Boulevard, Woodside, New York, where the Respondent employs about 60 employees.

The Union began an effort to organize employees of the Respondent in or about March 2001 when one of its organizers started talking to employees outside the Northern Boulevard facility.

On or about March 28, 2001, Consuela Hodge was walking toward the bus stop on her way home when a woman who identified herself as Shirley stopped and asked if Hodge worked at the Respondent. This woman also asked about wages and working conditions. Hodge responded simply by saying that if the woman wanted such information she should go to the facility. Hodge stated that Shirley did not identify where she was from.

The next day, Hodge told another employee, Susan Manwaring, about her encounter at the bus stop. Manwaring opined that it probably was someone from a union. As the two were talking, Robin Adams, the program director, entered into the conversation and asked who the woman was, where she was from, and what she wanted. Hodge related her encounter of March 28 and Adams said that the woman was probably from a union. The con-

were engaged in union activity simply by speaking with a union representative). Furthermore, during their second encounter, Shirley asked Hodge whether she thought the staff at Hoffman would want a union. Hodge stated that she did not know, but she thought the employees needed one. I find that this conversation alone is sufficient to establish that Hodge was engaged in union activities.

[1] At the hearing, the Respondent asserted that allegations contained in the amended charge filed on December 28, 2001, are time-barred by Sec. 10(b) of the Act. The record shows that this amended charge was mailed to the Respondent on December 28, 2001, and in accordance with Sec. 102.113 of the Rules and Regulations, the date of service is the day on which it is deposited in the mail. *Sioux Quality Packers*, 228 NLRB 1034 (1977); *Sears, Roebuck & Co.*, 117 NLRB 522 (1957). (Proof of service made by ordinary mail is "presumptive" evidence of receipt.) Further, as pointed out by the General Counsel in her brief, the allegation of the amended charge, which is "solicitation of grievances," is closely related to the other allegations in the underlying charge. *Redd-I, Inc.*, 290 NLRB 115 (1988); *Nickles Bakery of Indiana*, 296 NLRB 927 (1989); *Ross Stores, Inc.*, 329 NLRB 573 (1999): and *Seton Co.*, 332 NLRB 979 (2000).

versation then ended and Hodge left. With respect to this conversation, the testimony of Robin Adams is essentially the same as Hodge's except that she claims that the word "union" was not used.

On the same evening, Hodge was again stopped by Shirley who told her that she was from the Union. According to Hodge, Shirley asked the same basic questions and asked how the employees were treated. Hodge stated that she told Shirley what her wages were and said that she had been in a union at another job. Shirley asked Hodge if she thought the other employees might want union representation and Hodge said that she didn't know.

According to Hodge, on or about Friday, March 31, 2001, Carol Roberti, then the Respondent's program director called her into the office and said that she heard that somebody was asking her questions at the bus stop. Hodge said this was true. Hodge stated that Roberti asked for a description of the person (nationality, gender clothes, etc.) and that she told Roberti that the woman had braids and was African-American. That seemed to be the extent of the conversation and there was no assertion by Hodge that Roberti asked her specifically about a union or how she felt about a union. (Indeed, there is no evidence that Hodge actually engaged in any union activity.)

Larry Evans testified that he too was met after work by Shirley who asked him about the working conditions at the Respondent. He placed this encounter in March or April 2001.

Evans testified that the day after he spoke to Shirley, Roberti paged him to go to her office where she mentioned that Consuelo Hodge had been approached by a person from a union. According to Evans, Roberti asked him for a description of the person, which he gave. Although not clear on the transcript, it seems that Evans asserted that Roberti asked him if he had been in a union before and that she mentioned that she too had been in a union.[2]

At the time of the hearing, Roberti was no longer employed by the Respondent and was not called as a witness.

There is no question but that in the spring of 2001, the Respondent figured out that there was Union trying to organize.

In May 2001, Kathleen Meskell, the executive vice president, visited the Hoffman facility and spoke to the staff about various programs. At this meeting, Larry Evans asked a question about fundraising and the allocation of funds to various programs. According to Meskell, she remembered this question by Evans because it was sort of unusual. She testified that he asked how the Respondent distributed funds and after explaining the process, Evans suggested that the Respondent had made a bad business decision by using money to underwrite a failing program; that if it wasn't getting funding, it should be closed. Meskell testified that she responded that the Respondent had an obligation to provide services to handicapped people and that closing a money losing program would cause some employees to lose their jobs.

The General Counsel does not allege that anything said by Meskell at the May meeting violated the Act.

However, Evans testified that in July 2001 Meskell was at the facility and said to him, "[D]o you know that if the union comes in, some jobs will be lost." This is denied by Meskell who says that she was not at the Hoffman facility in July on business. But she does acknowledge that she visits the facility, from time to time, to visit her sister who is a customer there.

In June 2001, the Union distributed a flyer indicating that it had filed an unfair labor practice charge against the Company. The flyer notified employees of their rights and solicited employees to contact the Union if they felt that those rights had been infringed in any manner. Among other things, the flyer accused management of mistreating employees for speaking with representatives from CSEA. [3]

On or about June 11, 2001, Roberti held a meeting where she held up the flyer and commented on it. According to Hodge, Roberti had some papers in her hand and asked the assembled group if they knew about unfair labor practice charges and if they felt that they were being treated unfairly. Hodge testified that when no one responded, Roberti said that she had an open-door policy and that employees didn't need a union to come speak for them.

Susan Manwaring, who was called by the Respondent, testified that Roberti had the flyer on her desk and merely asked the employees if they felt threatened.

Robin Adams testified that at the June 11 meeting Roberti, referring to the flyer, said that it claimed that employees were being mistreated and asked if anyone felt that this was the case. Adams testified that Roberti told employees that she had an open-door policy, which Adams states was, in fact, consistent with the existing practice.[4]

Roberti held another meeting with employees in late August 2001. Hodge's recollection of this meeting was somewhat disjointed. As far as I can tell from Hodge's testimony, Roberti apparently referred to some unfair labor practice charge that had been filed,[5] asked the employees if they knew anything about it, and asked if they felt that they were being treated unfairly. According to Hodge, Roberti repeated that she had an open-door policy and that the employees did not need anyone to talk for them. Hodge testified that at the end of the meeting, Roberti held up the sign-in sheet and said she was going to use it in court.

Susan Manwaring recalled that Roberti held a second meeting in August 2001 where she talked about a charge, which alleged that the staff was being treated unfairly. She testified that Roberti asked the assembled employees if they felt threatened and if so, they could come and talk to her.

III. ANALYSIS

The complaint alleges that the Respondent, on various occasions, interrogated employees, either about the Union, their union activities, or about unfair labor practice charges that were filed by the Union.

[2] Evan's testimony was: "She mentioned to me had I been in the union. I said, Yes. She mentioned, she had also been in the union."

[3] The charge in Case 29–CA–2269 was filed on May 30, 2001.

[4] The Company's personnel policy manual does have a provision at 6.04, modified on March 1995 which provides for a procedure whereby an employee with a complaint or grievance can bring it to the attention of his or her immediate supervisor at step one; then bring it to the attention of the program director at step two, and finally bring it to the attention of the human resource department at step 3.

[5] The charge in Case 29–CA–24318 was filed on June 27, 2001.

Interrogation by management of employees is the kind of activity that sometimes violates the Act, and sometimes does not. It depends on the circumstances.

In *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. 760 F.2d 1006 (9th Cir. 1985), the Board held that interrogations may be considered noncoercive with the meaning of Section 8(a)(1) of the Act, if they are unaccompanied by threats of reprisal or force or promises of benefits. See also *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964).

With respect to the events of late March 2001, the testimony of Hodge indicates that she was the person who volunteered to others that she had been approached at the bus stop by a person asking her questions about her employer but who did not identify herself as a union representative. When she was asked by Roberti to describe this person and what she said, Hodge was not asked anything about a union or union activity.

Evans was also asked by Roberti about being approached by this woman. And in this case, according to Evans, Roberti said that she had heard that Hodge had been approached by someone from a union.

In neither case, however, did Roberti interrogate either employee about their union sympathies or their union activities (which were nonexistent). Nor did she make any threats or promises. In my opinion, the mere fact that Roberti sought to satisfy her curiosity as to who was approaching employees on their way home, was normal behavior and was rather innocuous and noncoercive.

Nor do I conclude that Roberti gave either employee the impression that their union activities were under surveillance when she indicated that she was aware that they had been approached by Shirley. The fact is that neither employee was, at the time, engaged in any union activity and there was nothing in Roberti's statements which, in my opinion, could reasonably lead either employee to conclude that their own union activities, or the activities of other employees, were being spied on or being kept under surveillance. See *Grouse Mountain*, 333 NLRB 1322 (2001); *Tres Estrellas de Oro*, 329 NLRB 50 (1999). In *South Shore Hospital*, 229 NLRB 363 (1997), the Board rejected the contention that the Respondent had unlawfully created the impression of surveillance based on a statement to the effect that there was talk of having a union all over the hospital. The Board noted that the statement indicated, at most the company was merely aware of the interest in unionization by some of the employees.

With respect to the meetings held in June and August 2001, the General Counsel alleges that Roberti, interrogated employees and impliedly solicited grievances with an attendant promise to remedy them. I don't agree.

Clearly, Roberti called the June 2001 meeting in response to a flyer distributed by the Union, which accused the Company of committing unfair labor practices and mistreating employees. Roberti's inquiry as to whether any of the employees felt threatened by the Company (as alleged by the Union), does not, in my opinion, amount to illegal interrogation. Rather, it is a normal response to a serious accusation and is viewed by me simply as a rhetorical question. Similarly, the reference to an open-door policy, which was already in existence at the time, does not strike me as constituting a solicitation of grievances with an attendant promise to remedy them. *PYA/Monarch, Inc*., 275 NLRB 1194 (1985). See also *Uarco, Inc*., 216 NLRB 1 (1974); and *Genzer Tool & Die Corp.*, 268 NLRB 330 (1983).

Much the same can be said for the August meeting where Roberti, apparently in response to an unfair labor practice allegation, gathered employees together and asked if any felt threatened. Again her reference to an open-door policy was not, in my opinion, a violation of the Act.

However, I will credit the testimony of Larry Evans to the effect that in July 2001, Meskell said to him, "do you know that if the union comes in, some jobs will be lost." I suspect that this off hand statement made by Meskell was a kind of followup to Evan's comment at an earlier meeting to the effect that one way to save money was to cut unprofitable programs. (Which of course would have meant cutting jobs.) I doubt very much that Meskell intended her remark as a threat of reprisal and she probably made the remark simply as a statement of opinion. But, from Evan's point of view, her statement could reasonably be viewed as a threat that unionization could lead to the loss of jobs. In viewing such statements, the speaker's subjective intent is really not relevant. What is relevant is the reasonably expected impact on the listeners if the listeners are employees. The law does not require the listener to be a mind reader in order to decipher a speaker's subjective intent.

There is a decent argument that Meskell's statement should be considered de minimis. The statement was made by one manager to one employee and is the only troubling remark made by representatives of the Respondent over a 5-month period in the context of an union organizing drive involving about 60 employees.

But there are statements and statements. It would be one thing if the statement in question was a promise, or a single instance of a coercive interrogation, or a single statement that selecting a union would be futile. But having credited Evan's version, it is my opinion that Meskell's statement is more serious in that it could reasonably be viewed as a threat of layoff or discharge. I therefore shall conclude that the statement is not de minimis and requires a remedy.

CONCLUSIONS OF LAW

1. By telling an employee that if a union comes in it may cost jobs, the Employer violated Section 8(a)(1) of the Act.

2. The Employer has not violated the Act in any other manner encompassed by the complaint.

3. The unfair labor practice found, affects commerce within the meaning of Section 8(a)(1) and Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the

ORDER

The Respondent, Heartshare Human Services of New York, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that selection of a union might cost them jobs.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in, Queens, New York, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2001.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.